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**International Legal Avenues to Address the
Plight of Victims of Climate Change:
Problems and Prospects**

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According to the Intergovernmental Panel on Climate Change (IPCC), human-induced climate change will transform the ecological balance of our planet and lead to dramatic societal problems.¹ Based on these projections, it seems natural that the international society would be doing everything in its power to combat climate change. Unfortunately, this is not the case. Because the global economy relies so heavily on the burning of fos-

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¹ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR POLICYMAKERS 12 (2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg2.htm>.

sil fuels, the primary cause of climate change, forming effective mechanisms to control and mitigate climate change is not easy.²

The development of the Kyoto Protocol³ (Protocol) demonstrates the difficulty of organizing an effective international response to climate change. The events leading up to the Protocol began at the Rio Conference on Environment and Development.⁴ At the conference, 156 countries signed the 1992 United Nations Framework Convention on Climate Change⁵ (Climate Convention or Convention), an agreement setting forth general obligations on nation-states (states) to mitigate climate change and adapt to its consequences.⁶ In 1997, the Kyoto Protocol to the Convention was adopted.⁷ The Protocol imposed concrete obligations on states to reduce their greenhouse gas emissions during the first commitment period, 2008-2012.⁸ However, after both the United States and Australia refused to ratify the Protocol,⁹ it seemed that the Protocol would not become operational. Following its ratification by Russia, the Protocol became binding on February 16, 2005.¹⁰

Even though the Protocol commits its state parties to certain emissions reductions, these standards do not meet those recom-

² See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 2 (2007), available at <http://www.ipcc.ch/ipcc/reports/ar4-wg1.htm>.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/7/Add.1, 3, Dec. 11, 1997, 37 I.L.M. 22 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol].

⁴ See Five Years After Rio: What was the Earth Summit?, <http://www.iisd.org/rio+5/earthsummit.htm> (last visited Nov. 1, 2007) (providing information on the Rio Conference and links to related documents).

⁵ United Nations Framework Convention on Climate Change, Status of Ratification, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Oct. 14, 2007).

⁶ United Nations Framework Convention on Climate Change, http://unfccc.int/essential_background/convention/items/2627.php (last visited Oct. 14, 2007).

⁷ United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Oct. 14, 2007).

⁸ Kyoto Protocol, *supra* note 3.

⁹ FARHANA YAMIN & JOANNA DEPLEDGE, THE INTERNATIONAL CLIMATE CHANGE REGIME: A GUIDE TO RULES, INSTITUTIONS AND PROCEDURES 15 (2005).

¹⁰ United Nations Framework Convention on Climate Change, Status of Ratification, http://unfccc.int/kyoto_protocol/background/status_of_ratification/items/2613.php (last visited Oct. 26, 2007); Pew Center on Global Climate Change, Q & A: Russia and the Kyoto Protocol, http://www.pewclimate.org/what_s_being_done/in_the_world/russia_kyoto_q_a.cfm (last visited Oct. 26, 2007).

mended by climate scientists.¹¹ Furthermore, developing states lack any emissions-reduction obligations.¹² For instance, China and India are among the worst emitters of greenhouse gases but have no reduction commitments.¹³

This is alarming news for those states and people who will suffer the most severe consequences of climate change. The worst emitters of greenhouse gases are either outside the Protocol altogether or have no binding reduction obligation. Even if the United States and Australia decided to ratify the Protocol, its reduction standards are clearly inadequate.

In light of this regulatory failure, victims of climate change have started to think of ways to bring the worst emitters of greenhouse gases to justice. When signing the Climate Convention, the small island states declared that their participation did not relieve the legal responsibility of those states contributing the most emissions.¹⁴ Tuvalu, a small island state in the South Pacific whose land will be inundated within the next fifty years, announced in 2002 that it would take Australia to the International Court of Justice (ICJ).¹⁵ With the help of the Inuit Circumpolar Council (ICC), the Inuit recently filed a petition against the United States with the Inter-American Commission of Human Rights (IACHR) of the Organization of American States (OAS).¹⁶ The 167-page petition carefully details the particular human rights the United States has violated in the course of being the world's worst emitter of greenhouse gases.¹⁷ The petition asserts that these emissions are directly correlated to the destruction of the Inuit's environment and culture.¹⁸ Ultimately, the

¹¹ Sarah A. Peay, *Joining the Asia-Pacific Partnership: The Environmentally Sound Decision?*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 477, 481 (2007).

¹² *Id.* at 480-81.

¹³ BBC NEWS, *Climate Change: The Big Emitters*, July 4, 2005, <http://news.bbc.co.uk/1/hi/sci/tech/3143798.stm>.

¹⁴ See *infra* notes 37-41 and accompanying text.

¹⁵ BBC NEWS, *Tiny Pacific Nation Takes on Australia*, Mar. 4, 2002, <http://news.bbc.co.uk/2/low/asia-pacific/1854118.stm>. No more detailed information is available on the subject, and Tuvalu has not specified its plan as to how and when it will file its petition with the ICJ.

¹⁶ Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Dec. 7, 2005, at 1, available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [hereinafter ICC Petition].

¹⁷ *Id.*

¹⁸ *Id.* at 5.

goal of their petition is to have the IACHR pronounce that the United States has breached the Inuit's internationally guaranteed human rights.¹⁹

The legal strategies of Tuvalu and the ICC are the only cases in which a victim of climate change has announced that it will take its claim to international legal proceedings. However, other legal mechanisms may also be available. For instance, the dispute settlement procedures under the United Nations Convention on the Law of the Sea (UNCLOS)²⁰ and the advisory opinion of the ICJ have both been endorsed as promising legal responses to climate change.²¹

This Article argues that the current structure of international law makes it unlikely that victims of climate change will find justice through international legal proceedings. Part I examines the various international legal proceedings that could provide recourse for victims of climate change. Part II focuses on the only case that has proceeded to the submission stage, the above-mentioned Inuit petition to the IACHR. Importantly, the Inuit's human rights petition is currently the best possibility for success in international litigation since evidence already exists that climate change has caused clearly identifiable damage to the Arctic environment.²² The Article concludes by analyzing the likelihood of successfully combating climate change by utilizing the legal mechanisms discussed in Parts I and II.

I

TAKING CLIMATE CHANGE TO INTERNATIONAL LEGAL PROCEEDINGS

Various legal mechanisms could potentially help bring the worst greenhouse gas emitters to justice. Both national and international legal avenues exist, but this Article focuses only on international law.²³ As a preliminary matter, it is important to

¹⁹ *Id.* at 7.

²⁰ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

²¹ See, e.g., Rebecca Elizabeth Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 115 (2005).

²² See ARCTIC COUNCIL, ARCTIC CLIMATE IMPACT ASSESSMENT 990-92 (2005), available at <http://www.acia.uaf.edu/pages/scientific.html>.

²³ For more information regarding litigation to combat climate change in various nations, see Climate Justice: Cases, <http://www.climatelaw.org/cases> (last visited Oct.

understand the litigation terminology used in international law. Dispute settlement mechanisms are normally classified as either political or legal. The former resolves disputes without producing a legally binding decision.²⁴ The latter refers to mechanisms such as arbitration and judicial settlement in which a third party makes a decision that is legally binding on the disputing states.²⁵ This clear-cut distinction between legal and political settlement mechanisms does not extend to the actual disputes, for both types of disputes are regulated in international law.²⁶ In this Article, the broader term “international legal proceedings” is used to denote all those procedures that may be helpful for victims of climate change, regardless of whether the proceedings produce a legally binding decision. Good examples of such procedures are the decisions by the supervisory bodies of international treaties, conciliation procedures, and advisory opinions of the ICJ.²⁷

Because the damage resulting from climate change is covered by various spheres of international law as well as specific mechanisms to implement legal responsibility, Part I is divided into three sections: climate regime, norms of general international law, and sector-specific regimes. To at least some degree, each section includes discussion related to primary norms (norms that regulate the behavior of a legal entity), secondary norms (norms that determine the consequences of a breach of regulated behavior),²⁸ and procedures to deal with behavior that violates the regulations.

The Climate Convention includes general rules that require virtually all states in the world to begin to slow down climate change and adapt to its effects.²⁹ Negotiated within the frame-

14, 2007). For more information regarding litigation within the framework of the United States legal system, see David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003).

²⁴ See ANTONIO CASSESE, INTERNATIONAL LAW 279-80 (2d ed. 2005).

²⁵ See *id.* at 281-82.

²⁶ See *id.* at 278-95, 326.

²⁷ See Jacobs, *supra* note 21, at 115.

²⁸ The division into primary and secondary norms emerged during the United Nations International Law Commission's state responsibility project. See U.N. Int'l Law Comm'n, *Second Report on State Responsibility*, ¶¶ 12-30, U.N. Doc. A/CN.4/233 (Apr. 20, 1970) (prepared by Roberto Ago), available at http://untreaty.un.org/ilc/documentation/english/a_cn4_233.pdf.

²⁹ See United Nations Framework Convention on Climate Change art. 4, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC]. Currently, 192 countries have ratified the Climate Convention. United Nations Framework Convention on

work of the Convention, the Kyoto Protocol commits industrial countries to specific, definite emissions reductions.³⁰ The climate regime, which consists of both the Convention and the Protocol, also includes rules outlining how disputes concerning the regime are to be handled.³¹ Furthermore, the climate regime creates bodies that monitor implementation of the Convention.³² The Compliance Committee of the Protocol has the authority to determine different forms of sanctions if a state fails to comply with its obligations.³³

General international law includes principles that can be interpreted to compel states to conform to certain standards of behavior, including actions related to climate policy. General international law on state responsibility determines the consequences of an illegal act, and these rules are also applied *lex generalis* in cases where a specific regime provides no rules of its own. In principle, general international law is to be applied to all international legal proceedings, either individually or together with sector-specific rules.

Since the effects of climate change are so comprehensive, greenhouse gas emissions may also contravene other legal international obligations, such as those relating to UNCLOS.³⁴ The norms for these sectors, as well as their related independent mechanisms for monitoring and settling disputes, constitute a third route to bringing about legal responsibility for greenhouse gas emissions.

A. *Climate Regime*

The parties negotiating the Climate Convention knew that climate change would continue despite the general measures laid out in the Convention. Early in the negotiations, the Alliance of Small Island States (AOSIS) attempted to include an article in the Convention that would have implemented a specific standard

Climate Change, Status of Ratification, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Oct. 14, 2007). Likewise, 175 parties have ratified the Kyoto Protocol. United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Oct. 14, 2007).

³⁰ Kyoto Protocol, *supra* note 3, art. 3.

³¹ See YAMIN & DEPLEDGE, *supra* note 9, at 382-84.

³² *Id.* at 389-92.

³³ *Id.* at 389.

³⁴ UNCLOS, *supra* note 20.

of state responsibility.³⁵ Even though the question of state responsibility was still an issue during the fifth negotiating round in New York, it was fully deleted from the final Convention text due to objections from industrial countries.³⁶ Many small island states responded to this omission by making official declarations to the Convention. For example, Tuvalu made the following declaration upon its signing of the Convention:

The Government of Tuvalu declares its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.³⁷

Papua New Guinea, Fiji, the Solomon Islands, and Kiribati made similar declarations.³⁸

Since the Kyoto Protocol's emissions-reduction standards were too lax to effectively combat climate change, small island states also made declarations concerning the Protocol. Kiribati's declaration echoed those made by the small island states when they first signed the Climate Convention.³⁹ Other parties such as Niue and the Cook Islands issued declarations similar to this one made by the Republic of Nauru:

The Government of the Republic of Nauru declares its understanding that the ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change The Government of the Republic of Nauru further declares that, in the light of the best available scientific information and assessment of climate change and impacts, it considers the emissions of [sic] reduction obliga-

³⁵ RODA VERHEYEN, *CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY* 50-52 (2005).

³⁶ *See id.* at 52-53.

³⁷ United Nations Framework Convention on Climate Change: Status of Ratification (2007), http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf (declaration number two).

³⁸ *Id.* (declaration numbers seven (Papua New Guinea), five (Fiji), eleven (Solomon Islands), and three (Kiribati)).

³⁹ Kyoto Protocol: Status of Ratification (2007), http://unfccc.int/files/kyoto_protocol/background/status_of_ratification/application/pdf/kp_ratification.pdf (declaration number six: "The Government of the Republic of Kiribati declares its understanding that accession to the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of the climate change and that no provision in the Protocol can be interpreted as derogating from principles of general international law.").

tions in Article 3 of the Kyoto Protocol to be inadequate to prevent the dangerous anthropogenic interference with the climate system [Nauru also declares] that no provisions in the Protocol can be interpreted as derogating from the principles of general international law[.]⁴⁰

With these declarations, the small island states made it clear that they did not believe that the emissions reductions in the Kyoto Protocol were sufficient to prevent the dangerous interference with the climate system as specified in Article 2 of the Climate Convention.⁴¹ In addition, they demonstrated their belief that the worst greenhouse gas emitters can still be held legally responsible for their actions.

From the viewpoint of the small island states, the greatest problem with the climate regime is that so far, commitments to emissions reductions have been relatively mild in comparison with those demanded by the scientific community.⁴² This problem is exacerbated because the worst polluters have not committed themselves to the Protocol and because developing nations have no binding obligations to reduce emissions.⁴³ Furthermore, no long-term international climate policy can be established, for the climate regime requires all states to consent to their reduction obligations every five years.⁴⁴ Negotiations began in 2005 for reducing emissions during the second commitment period, 2012-2016.⁴⁵

Given this information, could these small island states use the climate regime to bring the worst emitters of greenhouse gases to justice? A natural starting point is the Climate Convention,

⁴⁰ *Id.* (declaration number seven).

⁴¹ UNFCCC, *supra* note 29, art. 2.

⁴² VERHEYEN, *supra* note 35, at 62-67.

⁴³ See UNFCCC, *supra* note 29, art. 4(2).

⁴⁴ See Kyoto Protocol, *supra* note 3, art. 4(9), art. 21(7).

⁴⁵ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Montreal, Can., Nov. 28 - Dec. 10, 2005, *Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol 3*, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006), available at <http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf>. A 2005 conference in Montreal for the parties to the Climate Convention simultaneously served as a meeting for the parties to the Kyoto Protocol and established the negotiation process to determine the mitigation commitments that would follow the first commitment period. *Id.*; see also Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, Bonn, F.R.G., May 17-25, 2006, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol*, U.N. Doc. FCCC/KP/AWG/2006/2 (July 18, 2006), available at <http://unfccc.int/resource/docs/2006/awg1/eng/02.pdf>.

which carries nearly universal force and imposes many general obligations on its state parties. Article 2 of the Convention states:

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁴⁶

Article 2 can be seen as legally significant because it constitutes the object and purpose of the Convention in the meaning of the customary law of treaties.⁴⁷ Thus, Article 2 could be used as an aid to interpret the other articles of the Convention. Moreover, in accordance with Article 18 of the Vienna Convention on the Law of Treaties, a state that signs a convention must restrain itself from measures that would defeat the object and purpose of the convention.⁴⁸ Often, however, Article 2 is seen only as a non-binding text for setting the political objectives of the climate regime.⁴⁹

Article 4, paragraph 2 of the Climate Convention could arguably create a legally binding obligation.⁵⁰ This Article requires industrial countries to commit to lowering their greenhouse gas emissions by the year 2000 to the level they emitted in 1990—an objective they have failed to meet.⁵¹ According to the mainstream view however, even this goal was drafted to constitute more of a soft objective.⁵² The Kyoto Protocol also includes de-

⁴⁶ UNFCCC, *supra* note 29, art. 2.

⁴⁷ VERHEYEN, *supra* note 35, at 56.

⁴⁸ *Id.* at 56; *see also* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. The Vienna Convention on the Law of Treaties, to a great extent, codified international customary law. *See* Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in *INTERNATIONAL LAW* 190 (Malcolm D. Evans ed., 2d ed. 2006).

⁴⁹ *See, e.g.*, PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 524-26 (2d ed. 2002); PHILLIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 361-65 (2d ed. 2003).

⁵⁰ UNFCCC, *supra* note 29, art. 4(2).

⁵¹ *Id.*

⁵² *See* BIRNIE & BOYLE, *supra* note 49, at 526; SANDS, *supra* note 49, at 364-65. Some commentators have argued that the legal status of this article is questionable.

tailed emissions-reduction obligations for industrial countries,⁵³ but these too remain insufficient considering that the United States and Australia have not ratified the Protocol.

Article 14 of the Climate Convention offers the parties various opportunities to settle their disputes.⁵⁴ If parties wish to submit their problem to legal dispute settlement, they may declare so in a written instrument.⁵⁵ However, only one such declaration has been made to date.⁵⁶ Article 14, paragraph 5 includes rules for a conciliation procedure.⁵⁷ This procedural alternative permits a small island state to launch an investigation to determine whether any damage it has sustained is related to the climate policy practiced in another country.⁵⁸ Based on this investigation, a non-binding recommendation would be suggested to resolve the dispute.⁵⁹ In this way, the small island states could authoritatively resolve uncertainties related to the relationship between the causes of climate change and the damages resulting from them.

This conciliation procedure may not yet be available because the Conference of the Parties has not satisfied the precondition of approving rules for its application.⁶⁰ Article 13 of the Climate Convention requires the Conference of the Parties to consider the establishment of a multilateral consultative process during its

See, e.g., Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 *YALE J. INT'L L.* 451, 516 (1993).

⁵³ Kyoto Protocol, *supra* note 3, art. 3.

⁵⁴ UNFCCC, *supra* note 29, art. 14.

⁵⁵ *Id.* art. 14(2).

⁵⁶ United Nations Framework Convention on Climate Change: Status of Ratification (2007), http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf (declaration number eleven, Solomon Islands). Upon ratification of the Climate Convention, the Solomon Islands accepted the arbitration as a means for settling their disputes over the interpretation and application of the Climate Convention with another party having made the same declaration.

⁵⁷ UNFCCC, *supra* note 29, art. 14(5).

⁵⁸ YAMIN & DEPLEDGE, *supra* note 9, at 383.

⁵⁹ UNFCCC, *supra* note 29, art. 14(6).

⁶⁰ *See* Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 *ENVTL. L. REP.* 10,185, 10,188 (2003) (referring to article 14(6), which requires the Conference of the Parties to approve detailed rules on the conciliation procedure). However, it is also possible to interpret this provision merely as a simple amplification rather than an absolute condition. *See* UNFCCC, *supra* note 29, art. 14(6)-(7) ("Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.").

first session.⁶¹ This process would be available to parties upon request for the resolution of questions regarding the implementation of the Convention.⁶² While this multilateral consultative process was indeed developed by the Conference of the Parties, its development ceased after acceptance of the Kyoto Protocol and its Compliance Committee.⁶³

The Compliance Committee handles breaches of obligations set forth in the Kyoto Protocol.⁶⁴ Although the Compliance Committee has extensive authority, particularly in its enforcement division,⁶⁵ it is unlikely that the small island states would present it with their legal demands for two reasons. First, the worst greenhouse emitters remain outside the Protocol, and as developing nations, China and India have no binding obligation to reduce their emissions. Second, the Compliance Committee only investigates whether parties to the Kyoto Protocol are observing their obligations.⁶⁶ The Committee has no authority generally to investigate claims for compensation of damages due to climate change.

To summarize, the climate regime essentially offers no opportunities for small island states to take the worst greenhouse gas emitters to the regime's own legal proceedings. A better opportunity may indeed lie in appealing to general international law and to the rules governing state responsibility. As mentioned above, Tuvalu (later joined by Kiribati and the Maldives) announced in 2002 that it was taking Australia to the ICJ.⁶⁷ At the same time, it stated that it was seeking refuge for its population as environmental refugees in Australia and New Zealand.⁶⁸

⁶¹ UNFCCC, *supra* note 29, art. 13.

⁶² *Id.*

⁶³ See VERHEYEN, *supra* note 35, at 117.

⁶⁴ See United Nations Framework Convention on Climate Change, Introduction, http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php (last visited Oct. 20, 2007).

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See BBC NEWS, *supra* note 15.

⁶⁸ Jacobs, *supra* note 21, at 109; see also Akiko Okamatsu, *Problems and Prospects of International Legal Disputes on Climate Change*, BERLIN CONFERENCE ON THE HUMAN RIGHTS DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE (2005), http://web.fu-berlin.de/ffu/akumwelt/bc2005/papers/okamatsu_bc2005.pdf (providing further detail and background).

B. General International Law

General international law provides some opportunities for advancing climate change litigation. It might even be possible to ask whether major greenhouse gas emitters are committing international crimes by failing to enact policies to combat climate change. At one stage of the United Nations International Law Commission's (ILC) project on state responsibility, this kind of argument could have been made. Draft Article 19, paragraph 3 provided that:

Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from . . . (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those *prohibiting massive pollution of the atmosphere or of the seas*.⁶⁹

Based on this language, a state's deliberate unwillingness to reduce its considerable greenhouse gas emissions would seem to qualify as massive pollution of the atmosphere, especially because the effects of climate change are both substantial and long-standing. However, the distinction between international crimes and international delicts proved controversial and was dropped just before the ILC adopted the articles on state responsibility in 2001.⁷⁰ As a result, the whole concept of state crimes is now bathed in uncertainty.⁷¹

It is also possible to argue that some of the principles of international environmental law have become part of general international law and therefore require reduction of greenhouse gas emissions from all states of the world. Small island states could rely on the principle of equity between generations and/or the precautionary principle, but the legal status of these principles is

⁶⁹ *Draft Articles on State Responsibility*, 2 Y.B. Int'l L. Comm'n 30, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1980_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p2_e.pdf) (emphasis added). The issue of international crimes was still debated in 1998 by the International Law Commission. See *State Responsibility*, [1998] 2 Y.B. Int'l L. Comm'n 60-76, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1998_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1998_v2_p2_e.pdf).

⁷⁰ See U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, ch. 3, ¶ 7 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁷¹ See *State Responsibility*, [1998] 2 Y.B. Int'l L. Comm'n 77, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1998_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1998_v2_p2_e.pdf).

unclear.⁷² State responsibility could also be based on the theory of due diligence, which is an accepted principle of international law.⁷³

Even though Tuvalu has tried to institute proceedings against Australia and the United States, there has been no progress in these matters. The central reason for this standstill is jurisdictional. The ICJ's jurisdiction is confined to only those disputes to which both parties have given their consent.⁷⁴ It is difficult to imagine that the United States, for instance, would consent to handling this kind of dispute in the ICJ.⁷⁵

Even if the ICJ did have jurisdiction, many other obstacles impede proceeding and succeeding with a case such as Tuvalu's.⁷⁶

⁷² See Jacobs, *supra* note 21, at 121-28.

⁷³ Richard S.J. Tol & Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages—A Legal and Economic Assessment* 32 ENERGY POL'Y 1109, 1110-15 (2004). The due diligence, or no-harm, principle is the most clearly accepted principle of international environmental law:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc A/CONF.151/5 (June 14, 1992), available at <http://www.unep.org/documents.multilingual/default.asp?documentID=78&articleID=1163>. Verheyen considers that "areas beyond the limits of national jurisdiction" could also cover the climate system. VERHEYEN, *supra* note 35, at 166-68; but see, e.g., BIRNIE & BOYLE, *supra* note 49, at 111 (arguing that this refers only to clear international areas, such as the moon or high seas).

⁷⁴ Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65, 73-74 (2007). The consent does not need to be specific to the dispute before the ICJ. *Id.* For instance, many existing multilateral and bilateral state agreements include the consent of states to submit their disputes to the ICJ. *Id.* at 74. Further, a state can also make a declaration that it consents to the general jurisdiction of the ICJ. Statute of the International Court of Justice, art. 36(2), June 26, 1945, 59 Stat. 1055, U.N.T.S. 993, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Nov. 18, 2007). There are currently sixty-five such states, but some declarations have removed various categories of dispute from the jurisdiction of the ICJ. Movsesian, *supra*, at 74 n.46; see also International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Oct. 20, 2007) (providing links to each state's declaration). A state can also make a declaration under the Climate Convention that it accepts the ICJ as a dispute-resolution mechanism. UNFCCC, *supra* note 29, at art. 14. However, no such declaration has been made.

⁷⁵ Movsesian, *supra* note 74, at 75 ("States tend to reject ICJ jurisdiction over disputes that implicate significant interests.").

⁷⁶ See Okamoto, *supra* note 68.

Standing is one such barrier. Although a broader construction of standing is developing in the international legal process, decisions are still largely based on promoting the interests of the state party.⁷⁷ Therefore, standing could be problematic for Tuvalu if it raised an *actio popularis* lawsuit against the defendants on behalf of the international community. Equally problematic is the fact that the ICJ has never condemned a country for damage it may cause in the future, a dimension that is at the core of climate change litigation.⁷⁸ Yet, the recent *LaGrand* judgment does seem to indicate that the international law of responsibility is moving toward preventing future breaches of law rather than only remedying past wrongs.⁷⁹

It might also be possible for the small island states to “bypass” the ICJ’s jurisdictional consent requirement by attempting to obtain an advisory opinion from the ICJ.⁸⁰ This approach involves convincing the United Nations (UN) bodies to ask the ICJ to issue an advisory opinion in order to clarify state responsibility regarding climate change.⁸¹ The ICJ is authorized to give an advisory opinion on almost any legal problem, provided that the request is made in accordance with Article 96 of the UN Charter.⁸² The request has to be made by the UN General Assembly, Security Council, or other UN organization.⁸³ Hence, an individual state cannot request an advisory opinion. A state’s proposal

⁷⁷ See Phoebe Okowa, *Issues of Admissibility and the Law on International Responsibility*, in *INTERNATIONAL LAW* 479, 496-98 (Malcolm D. Evans ed., 2d ed. 2006); *but see* CHRISTIAN J. TAMS, *ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW* 186 (2005). On the other hand, Tuvalu could claim that the activities of these states has already caused them material damage and that their climate policy has caused this damage by neglecting the due diligence principle.

⁷⁸ Jacobs, *supra* note 21, at 128. The problem also includes proving the causal relation between a state’s climate policy and climate change damages. *See* Okamoto, *supra* note 68, at 1-2; *but see* VERHEYEN, *supra* note 35, at 248-57.

⁷⁹ *See* *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 515 (June 27). *LaGrand* implies that in some situations “a duty to prevent future breaches can hardly be limited to bilateral legal relations between injured and responsible state [J]udgments awarding guarantees and assurances of non-repetition therefore seem more likely to have a general impact on a legal situation.” Christian J. Tams, *Consular Assistance and Rights and Remedies: Comments on the ICJ’s Judgment in the LaGrand Case*, 13 *EUR. J. INT’L L.* 1257 (2002), <http://www.ejil.org/journal/Vol13/No5/sr1.pdf>.

⁸⁰ *See* Strauss, *supra* note 60, at 10,188; Jacobs, *supra* note 21, at 115-18.

⁸¹ *See, e.g.*, *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16) (when Morocco failed to persuade Spain to submit the Western Sahara dispute to the ICJ, it passed a resolution at the UN General Assembly through which the ICJ was asked to give an advisory opinion).

⁸² U.N. Charter art. 96.

⁸³ *See id.*

to ask for an advisory opinion must obtain a simple or two-thirds majority in the General Assembly depending on the importance of the decision.⁸⁴ In its opinion concerning the use of nuclear weapons, the ICJ stated that the political body itself should determine what type of majority is needed to ask for an advisory opinion. In that case, the General Assembly considered a simple majority to be sufficient.⁸⁵

Achieving a majority within the General Assembly could be challenging even though there are many small island states.⁸⁶ In addition, climate change is an issue that divides the state community in quite a different way than the legality of using nuclear weapons.⁸⁷ It is surprising that there is no discussion in legal literature as to what a request from the General Assembly would ask for in an advisory opinion. After all, addressing this question is essential when evaluating whether sufficient support exists in the General Assembly to justify requesting an advisory opinion.⁸⁸ The more ambitious the request, the more difficult it would be to find allies in the General Assembly.

The ICJ did provide an interesting foundation from which to articulate a request to the General Assembly in its advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.⁸⁹ In that opinion, the court examined both the norms applying to the use of nuclear weapons (such as the norms relating to war) and other rules of international law (such as how international environmental law applies to the use of nuclear weapons).⁹⁰ Based on this type of reasoning, it seems possible to ask for an advisory opinion discussing climate change policy in terms of existing legal commitments such as the protection of certain species.

⁸⁴ *Id.* art. 18.

⁸⁵ See *Legality of the Threat or Use of Nuclear Weapons (Req. for Advisory Op.)*, available at <http://www.icj-cij.org/docket/files/95/7646.pdf> (last visited Nov. 2, 2007) (Seventy-eight votes for, forty-three against, and thirty-eight abstentions). "Equally, . . . the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 237 (July 8).

⁸⁶ Alliance of Small Island States, *The Alliance*, <http://www.sidsnet.org/aosis/> (last visited Oct. 21, 2007) (stating that its membership includes forty-three states).

⁸⁷ See Strauss, *supra* note 60, at 10,187.

⁸⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 226 (July 8).

⁸⁹ See generally *id.*

⁹⁰ *Id.* at 239.

UN organizations can also request advisory opinions.⁹¹ However, this possibility arguably became more difficult when the ICJ denied the World Health Organization (WHO) its right to request an advisory opinion on matters related to the legality of using nuclear weapons.⁹² In that case, the ICJ justified its denial by deciding that the issue did not fall within the WHO's mandate.⁹³ The United Nations Environmental Program (UNEP) would certainly qualify as an organization under whose mandate climate change issues belong.⁹⁴ However, UNEP has not been granted general authorization by the General Assembly to request an advisory opinion as have entities such as the WHO and the Food and Agriculture Organization.⁹⁵ The governing council of UNEP would therefore need to ask the General Assembly to make this kind of request on its behalf or obtain the General Assembly's authorization to make the request itself.⁹⁶

Overall, it seems possible to bring a climate change lawsuit at the level of primary norms. The principle of due diligence is unquestionably a part of international law and requires states to ensure that they cause no damage to the environment of other states. A small island state could claim, for example, that the United States plays a central role in causing climate change, that these changes damage the small island state's property and environment, and that the United States should therefore be held legally responsible in accordance with the rules of state responsibility. Although such a lawsuit at the level of primary norms seems possible, it is still difficult to make countries legally accountable due to the limits examined above related to the secondary rules and legal procedures of international law.

⁹¹ U.N. Charter art. 96(2).

⁹² Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8), available at <http://www.icj-cij.org/docket/files/93/7407.pdf>.

⁹³ See *id.* at 80.

⁹⁴ See United Nations Environmental Programme, About UNEP: The Organization, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43> (last visited Oct. 28, 2007).

⁹⁵ See Strauss, *supra* note 60, at 10,187; Jacobs, *supra* note 21, at 117.

⁹⁶ E-mail from Masa Nagai, Legal Division, United Nations Environmental Programme, to Timo Koivurova, Director, Northern Institute for Environmental and Minority Law (Aug. 29, 2006, 11:24 FST) (on file with author).

C. *Sector Regimes*

The damages caused by climate change concern virtually every aspect of life. The worst greenhouse gas emitters may damage the marine environment, the biodiversity of nature, or international trade—all of which are protected by various international rules and regulations and their supervisory bodies.⁹⁷ A recent example of this phenomenon is the application made by environmental organizations and private citizens to include certain places on the List of World Heritage in Danger.⁹⁸ This application was made on the basis of Article 11, paragraph 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage⁹⁹ because climate change threatens the future of these sites, including the Himalayas.¹⁰⁰

Groups suffering because of climate change could also resort to the dispute settlement mechanisms of the United Nations Convention of the Law of the Sea. UNCLOS is applicable because climate change damages the marine environment through increased shore erosion, penetration by seawater into freshwater and groundwater reserves, damage to fish populations and fisheries, and coral damage.¹⁰¹ The small island states could resort to several UNCLOS articles: 192, 194, 195, 207, and 212.¹⁰² Centrally, the victim groups could rely on the following language from Article 194(2):

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the

⁹⁷ See generally MEINHARD DOELLE, FROM HOT AIR TO ACTION? CLIMATE CHANGE, COMPLIANCE AND THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW 255-78 (2005); VERHEYEN, *supra* note 35, at 192-224.

⁹⁸ See Press Release, Climate Justice, UNESCO Danger-Listing Petitions Presented (Nov. 17, 2004), available at <http://www.climatelaw.org/media/2004Nov17>.

⁹⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 11(4), 27 U.S.T. 37, 15 U.N.T.S. 511, available at <http://whc.unesco.org/archive/convention-en.pdf>.

¹⁰⁰ See Press Release, Climate Justice, *supra* note 98. The application was rejected at the thirtieth World Heritage Committee meeting, although the Committee did decide to start a climate change strategy. Env't News Serv., *UNESCO Adopts Climate Change Strategy for World Heritage Sites*, July 11, 2001, <http://www.ens-newswire.com/ens/jul2006/2006-07-11-01.asp>.

¹⁰¹ See Intergovernmental Oceanographic Commission, Climate Change, <http://ioc.unesco.org/iocweb/climateChange.php> (last visited Oct. 28, 2007).

¹⁰² UNCLOS, *supra* note 20, arts. 192, 194-95, 207, 212.

areas where they exercise sovereign rights in accordance with this Convention.¹⁰³

The definition of “pollution of the maritime environment” could be interpreted to include climate change damage generating a rise in sea temperature. Such an interpretation is justifiable because the term in question is defined to include conducting energy into the marine environment as a form of pollution.¹⁰⁴

States that are a party to UNCLOS are obligated to resolve their disputes relating to its interpretation and application.¹⁰⁵ If they cannot resolve the dispute by themselves, it goes to a compulsory procedure chosen by states on the basis of written declarations they made when signing, ratifying, or acceding to UNCLOS.¹⁰⁶ In such a case, the forum is one of the following: the ICJ, the International Tribunal for the Law of the Sea (ITLOS), an arbitral tribunal, or a special arbitral tribunal.¹⁰⁷ If the states do not approve the same compulsory procedure, the dispute will be handled by arbitration.¹⁰⁸

According to Article 290 of UNCLOS, a state can seek provisional remedies from ITLOS, including measures to prevent serious damage to the marine environment.¹⁰⁹ Interestingly, ITLOS resorted to the principle of precaution in its judgment on provisional measures in the Southern Bluefin Tuna Cases.¹¹⁰ Provisional measures can also be sought from ITLOS when there is another compulsory procedure for the eventual dispute.¹¹¹ For example, Tuvalu could resort to arbitration against Australia by

¹⁰³ *Id.* art. 194(2).

¹⁰⁴ DOELLE, *supra* note 97, at 189-98; *see also* UNCLOS, *supra* note 20, art. 1(4) (“‘[P]ollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment” (emphasis added)).

¹⁰⁵ UNCLOS, *supra* note 20, art. 279.

¹⁰⁶ *Id.* art. 287(1).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* art. 287(5).

¹⁰⁹ *Id.* art. 290(1).

¹¹⁰ Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), 38 I.L.M. 1624, 1634 (Int’l Trib. for the Law of the Sea 1999) (“Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna . . . [the Tribunal] finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock[.]”). The application of the precautionary principle by ITLOS gives victim states better prospects for requesting provisional measures from ITLOS based on the climate policies of a major greenhouse gas emitter.

¹¹¹ UNCLOS, *supra* note 20, art. 290(5).

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claiming that Australia has infringed Article 194.¹¹² The claim would assert that Australia is responsible for an essential share of the greenhouse gases now causing different forms of damage to the marine environment of Tuvalu. Additionally, Tuvalu could seek provisional relief from ITLOS.¹¹³

II

INUIT VS. UNITED STATES: PETITION TO THE IACHR REGARDING DESTRUCTIVE IMPACTS OF CLIMATE CHANGE

Even though small island states have raised the possibility of using international legal proceedings to combat climate change, these considerations are not yet a reality. Scholars of international law have also surveyed various approaches to tackling climate change, but these also remain mostly theoretical.¹¹⁴ To date, the Inuit Circumpolar Council's (ICC) human rights petition against the United States is the only concrete action that has been taken. The ICC is an international non-governmental organization representing about 150,000 Inuit in Alaska, Canada, Greenland (Denmark), and Chukotka (Russia).¹¹⁵ The ICC developed the petition, but it was eventually submitted on behalf of the American and Canadian Inuit to the quasi-judicial IACHR.¹¹⁶

The ICC made the decision to develop its human rights petition in 2003.¹¹⁷ It organized a press meeting at the Tenth Conference of the Parties to the Climate Convention. In its statement, the ICC announced for the first time that it was filing a human

¹¹² Tuvalu could not resort to arbitration against the United States because the United States is not a party to UNCLOS. See Status of the United Nations Convention on the Law of the Sea, http://www.un.org/Depts/los/reference_files/status2007.pdf (last visited Nov. 2, 2007).

¹¹³ Jacobs, *supra* note 21, at 116 (referring to this possibility in the event the United States eventually ratifies UNCLOS).

¹¹⁴ See, e.g., Michael G. Faure & André Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 43A STAN. J. INT'L L. 123 (2007); Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231 (2001).

¹¹⁵ Inuit Circumpolar Council, Inuit Circumpolar Conference, http://inuitcircumpolar.com/index.php?ID=16&Lang=En&Parent_ID=16 (last visited Oct. 21, 2007).

¹¹⁶ See ICC Petition, *supra* note 16.

¹¹⁷ Inuit Circumpolar Council, Climate Change and Inuit Human Rights, ICC Executive Council Resolution 2003-O1 (2003), available at <http://www.inuit.org/index.asp?lang=eng&num=244> [hereinafter ICC Executive Council Resolution].

rights petition specifically against the United States.¹¹⁸ The petition alleged that the United States could be held individually accountable for climate change because of its status as the world's largest emitter of greenhouse gases.¹¹⁹ The petition further alleged that the effects of these gases contravened many human rights of the Inuit.¹²⁰ The ICC also emphasized that the IACHR was a proper forum in which to file the petition based on the IACHR's existing case practice.¹²¹

Sheila Watt-Cloutier, the ICC's chairperson at the time, submitted the Inuit petition to the IACHR on December 7, 2005.¹²² The petition named sixty-three other Inuit petitioners and was made on behalf of these people and all the Inuit living in the U.S. and Canadian Arctic regions.¹²³ Ms. Watt-Cloutier gave notification of filing during a side event at the Eleventh Conference of the Parties to the Climate Convention in Montreal, which also served as the first Meeting of the Parties to the Kyoto Protocol.¹²⁴

A. *The Inuit Petition*

When drafting the petition, the ICC received a great deal of assistance from environmental non-governmental organizations such as the Center for International Environmental Law¹²⁵ and Earthjustice.¹²⁶ The ICC also received help from specialists in the field of indigenous peoples' human rights, such as Professor

¹¹⁸ Press Release, Ctr. for Int'l Env'tl. Law, Inuit Leader Sheila Watt-Cloutier Announces Intention to File a Human Right Claim Against the U.S. for Its Dangerous Greenhouse Gas Emissions (Dec. 15, 2004), http://www.ciel.org/Climate/Lawsuit_Inuit_15Dec04.htm.

¹¹⁹ ICC Petition, *supra* note 16.

¹²⁰ *Id.* at 5.

¹²¹ See Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference, Speech Notes from the Tenth Conference of Parties to the United Nations Framework Convention on Climate Change (Dec. 15, 2004), <http://www.inuitcircumpolar.com/index.php?ID=282&Lang=En>.

¹²² ICC Petition, *supra* note 16.

¹²³ *Id.*

¹²⁴ Press Release, Inuit Circumpolar Council, Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America (Dec. 7, 2005), <http://www.inuitcircumpolar.com/index.php?ID=316&Lang=En>.

¹²⁵ See Center for International Environmental Law, Climate Change: CIEL Representing Inuit in Human Rights Case (Feb. 25, 2005), http://www.ciel.org/Climate/Climate_Inuit.html.

¹²⁶ See Press Release, Earthjustice, Inter-American Commission on Human Rights to Hold Hearing on Global Warming (Feb. 6, 2007), <http://www.earth>

James Anaya, who has considerable experience with the IACHR.¹²⁷

The ICC decided to submit a human rights petition with the IACHR for several reasons. First, it was not possible to appeal to the Human Rights Committee, which monitors the Covenant on Civil and Political Rights, because the United States is not a party to the optional protocol that grants individuals the right to make communications against state parties.¹²⁸ Therefore, the Covenant's optional protocol granting individuals the right to make communications against state parties was not available. Furthermore, the United States has not ratified the Inter-American Convention on Human Rights, so the Inter-American Court of Human Rights was also unavailable.

The IACHR appeared to be the most appropriate body to handle the petition because it had previously recognized the connection between human rights and a state's environmentally hazardous actions.¹²⁹ Therefore in principle, the IACHR could handle the impact of climate change as a human rights issue. Another positive characteristic of the IACHR is its ability to consider how human rights claims are being handled outside of the Inter-American human rights system.¹³⁰

justice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html.

¹²⁷ See ICC Executive Council Resolution, *supra* note 117.

¹²⁸ International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

¹²⁹ See, e.g., Yanomami Indians v. Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, ¶ 2 (1985), *available at* <http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm>; Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1, at ch. 7 (1997), *available at* <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.

¹³⁰ See, e.g., Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R. Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 86 (2004), *available at* <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm>. Both the U.N. Human Rights Committee and the European Commission of Human Rights have recognized the connection between human rights and environmental protection. See Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 263, 267 (1995). In the *Lubicon Lake Band* case, the Human Rights Committee viewed that the economic activities permitted by Canada to the Band's traditional territories violated their culture and traditional livelihoods protected by Article 27 of the Covenant on Civil and Political Rights. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 594-95 (2007).

Specific requirements determine how a petition to the IACHR is investigated.¹³¹ According to these procedural rules, private individuals or groups within the OAS member-states may file a petition.¹³² Petitions may also be filed by legally recognized non-governmental organizations in one or more member-states.¹³³ These petitioners can file on their own behalf or for a third party.¹³⁴ Third parties include indirect victims of human rights infringements.¹³⁵

In addition to setting forth a clear basis for its existence, a petition must explain whether domestic legal remedies have been exhausted and whether legal recourse has been sought from other international human rights bodies.¹³⁶ The IACHR's rules of procedure allow for several exceptions to the exhaustion of domestic remedies if, for example, national means for a legal remedy are ineffective.¹³⁷ The Inuit's petition reviews the possible avenues for legal remedies in the U.S. justice system. In particular, the petition attempts to show that the U.S. Constitution, tort laws, and environmental laws and regulations do not provide an effective remedy for the human rights violations suffered by the Inuit as a result of the United States' actions and omissions relating to climate change.¹³⁸

Professor Anaya and the ICC believe the petition has an excellent possibility of success.¹³⁹ However, given the unique character of the case, the petition could very well be held manifestly groundless and therefore inadmissible.¹⁴⁰ After all, asking the IACHR to pronounce the existence of a causal link between U.S. climate policy and Inuit human rights is a geographical stretch if nothing else.

¹³¹ See Rules of Procedure of the Inter-American Commission on Human Rights, OAS Special Res., 109th Sess. (2000) (amended 2006), available at <http://www.cidh.oas.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm> [hereinafter Rules of Procedure].

¹³² *Id.* art. 23.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *id.*

¹³⁶ See *id.* art. 28.

¹³⁷ See *id.* art. 31.

¹³⁸ See ICC Petition, *supra* note 16, at 112-16.

¹³⁹ See ICC Executive Council Resolution, *supra* note 117.

¹⁴⁰ See Rules of Procedure, *supra* note 131, art. 34(b).

On the other hand, the IACHR has the reputation of being a progressive and innovative body in the field of human rights.¹⁴¹ As previously mentioned, the IACHR's earlier cases demonstrate that it recognizes the connection between human rights and the environment. However, there is a clear difference between the ICC's petition and earlier cases. In all the previous cases, the question concerned a local environmental problem.¹⁴² Thus, the responsible party and the factors causing the problem could be determined with reasonable certainty.¹⁴³ In the Inuit case, the focus is on a complex, global environmental issue in which causes and impacts are still to some degree unclear. Even though current research persuasively shows that climate change is a human-induced phenomenon¹⁴⁴ and that its effects infringe on the human rights of the Inuit,¹⁴⁵ holding the United States solely accountable for what is clearly a global environmental problem is a tremendous leap to make despite the United States' role in generating greenhouse gases.

Since the United States is not a member-state of the American Convention on Human Rights,¹⁴⁶ the petition primarily relies on the American Declaration of the Rights and Duties of Man (American Declaration)¹⁴⁷ as its legal foundation.¹⁴⁸ Why does the petition invoke a non-binding declaration of human rights? If the defendant-state is not a party to the American Convention on Human Rights but is a member of the OAS, the Statute of the Inter-American Commission on Human Rights enables the American Declaration to be used as a source of law.¹⁴⁹

¹⁴¹ Megan Mooney, *How the Organization of American States Took the Lead: The Development of Indigenous Peoples' Rights in the Americas*, 31 AM. INDIAN L. REV. 553, 570-71 (2007).

¹⁴² See *supra* note 130.

¹⁴³ *Id.*

¹⁴⁴ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICY MAKERS 2 (2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg2.htm>.

¹⁴⁵ See ARCTIC COUNCIL, *supra* note 22, at 649-90.

¹⁴⁶ Organization of American States, Office of International Law: B-32: American Convention on Human Rights, <http://www.oas.org/juridico/english/sigs/b-32.html> (last visited Nov. 2, 2007).

¹⁴⁷ Organization of American States, American Declaration of the Rights and Duties of Man, 1948, O.A.S. Off. Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6, available at <http://www.oas.org/juridico/english/ga-res98/eres1591.htm>.

¹⁴⁸ See ICC Petition, *supra* note 16, at 74-95.

¹⁴⁹ See Statute of the Inter-American Commission on Human Rights, art. 20, OAS Res. 447, 9th Reg. Sess. (1979), available at http://www.oas.org/XXXVGA/english/doc_referencia/Estatuto_CIDH.pdf. Although this document is not legally

However, the Inuit petition does not rely on the American Declaration alone; it also invokes the American Convention on Human Rights.¹⁵⁰ The petition states that the IACHR has itself said, “The Commission has acknowledged that the American Convention on Human Rights ‘may be considered to represent an authoritative expression’ of the rights contained in the American Declaration, and is therefore properly considered in interpreting the Declaration’s provisions.”¹⁵¹ Upon this basis, the petition also invokes the case practice of the IACHR and the case law of the Inter-American Court of Human Rights because both have discussed the individual rights enshrined in the American Declaration.¹⁵² According to the IACHR’s case practice, “the American Declaration[] should be interpreted and applied in the context of developments in the field of international human rights law.”¹⁵³ The petition thus argues that various important international human rights instruments—the International Covenant on Civil and Political Rights,¹⁵⁴ the International Covenant on Economic, Social, and Cultural Rights,¹⁵⁵ other regional conventions on human rights, and ILO Convention No. 169 Concerning Indigenous and Tribal Peoples¹⁵⁶—and the practice of their supervisory bodies should be used when interpreting the individual rights of the American Declaration.¹⁵⁷

binding as a declaration, it has achieved international legal relevance through the so-called double-incorporation. See Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 393, 397 (Dinah Shelton ed., 2000). First, this declaration was included in the Statute of the Commission on Human Rights in 1960 at a time when the legal status of the Commission on Human Rights was still unclear. *Id.* Secondly, an amendment incorporated the Commission on Human Rights into the OAS Charter in 1970. *Id.* In this way, the declaration on human rights evolved to become legally binding and as such it has also been treated in the case-practice of the Commission on Human Rights. *Id.*

¹⁵⁰ ICC Petition, *supra* note 16, at 96.

¹⁵¹ *Id.* at 96 (quoting *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 125 (2002)).

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 95 (2004)).

¹⁵⁴ International Covenant on Civil and Political Rights, *supra* note 128.

¹⁵⁵ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

¹⁵⁶ International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, I.L.O. No. 69, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

¹⁵⁷ ICC Petition, *supra* note 16, at 96-97.

Citing a wide range of norms, the Inuit petition identifies various human rights violated by U.S. climate policy, particularly because several calculations show that America is the largest single contributor to climate change.¹⁵⁸ The petition incorporates many different sources of scientific evidence to prove that climate change is caused by human activity and to demonstrate the degree to which warming and its resulting changes have taken place.¹⁵⁹ The third assessment report by the IPCC of 2001 provides a firm foundation for this evidence,¹⁶⁰ but the Inuit petition also alleges that the research institutes and assessments ordered by the Bush Administration itself show that climate change is due to human activity.¹⁶¹

The petition also discusses how climate change has already resulted in extensive damage to the Inuit's traditional areas because snow and ice react so quickly to climate warming.¹⁶² These changes have been occurring in the Arctic since the 1960s and are confirmed by the Arctic Climate Impact Assessment (ACIA),¹⁶³ the Inuit's own observations,¹⁶⁴ and the assessments ordered by the Bush Administration.¹⁶⁵ ACIA's data is particularly significant because of the extensive coverage it provides regarding various impacts of climate change on indigenous peoples and their cultures in the Arctic regions.¹⁶⁶ With this information in mind, ACIA estimates that climate change consequences will

¹⁵⁸ See *id.* at 68-69.

¹⁵⁹ See *id.* at 20-34.

¹⁶⁰ *Id.* at 29-30.

¹⁶¹ *Id.* at 30-33.

¹⁶² *Id.* at 33-34.

¹⁶³ ARCTIC COUNCIL, *supra* note 22. The Arctic Council's climate policy began with the launch of the Arctic Climate Impact Assessment (ACIA). TIMO KOIVUROVA, ENVIRONMENTAL IMPACT ASSESSMENT IN THE ARCTIC: A STUDY OF INTERNATIONAL LEGAL NORMS 93 (2002). ACIA was conducted in much the same way as the IPCC assessments—by collecting published scientific studies and synthesizing their results. *Id.* at 305 n.1156. However, ACIA differed in that it was the first regional climate change assessment, it studied the impacts of ozone depletion in the Arctic region, and included the traditional knowledge and observations of indigenous peoples. See ARCTIC COUNCIL, *supra* note 22, at 990. ACIA results should influence the function of all policy-making within the Arctic Council. ARCTIC COUNCIL, *Preface to IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT* (2004); see generally ARCTIC COUNCIL, *supra* note 22; Timo Koivurova & David VanderZwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 U.B.C. L. REV. 121 (2007).

¹⁶⁴ ARCTIC COUNCIL, *supra* note 22, at 61-98.

¹⁶⁵ See ICC Petition, *supra* note 16, at 30-33.

¹⁶⁶ ARCTIC COUNCIL, *supra* note 22, at 649-90.

become more pronounced in the Arctic regions than elsewhere in the world.¹⁶⁷ For instance, ACIA predicts that the Arctic Ocean will be free of ice during the summer by the end of this century.¹⁶⁸

The petition identifies many different infringements of human rights that the Inuit have already experienced as a result of climate change. These include: violations of the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); the right to inviolability of the home (Article IX); the right to the preservation of health and well being (Article XI); the right to the benefits of culture (Article XIII); the right to work and to fair remuneration (Article XIV); and the right to property (Article XXIII).¹⁶⁹ The petition asserts that these rights should be interpreted in light of the development of human rights in the Inter-American system of human rights and the evolution of the whole human rights regime in international law.¹⁷⁰

The Inuit petition also urges the IACHR to take into consideration the international customary and treaty law to which the United States has legally committed itself.¹⁷¹ Both the IACHR and Inter-American Court of Human Rights have stated that if other international legal obligations of the OAS member states are relevant in resolving human rights petitions, those responsibilities should be taken into consideration.¹⁷² Accordingly, the petition refers to the United States' obligations under the Climate Convention and the customary law principles of precaution and due diligence.¹⁷³

Regarding the Climate Convention, the petition asserts that the United States has violated its obligation to lower its greenhouse gas emissions to 1990 levels by the year 2000.¹⁷⁴ The United States has definitely breached this obligation if it is indeed binding, for as the petition asserts, the United States openly

¹⁶⁷ *Id.*

¹⁶⁸ See ICC Petition, *supra* note 16, at 27-34; ARCTIC COUNCIL, *supra* note 22, at 989-1020.

¹⁶⁹ ICC Petition, *supra* note 16, at 74-96.

¹⁷⁰ *Id.* at 96-97.

¹⁷¹ See *id.* at 97.

¹⁷² *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 40 (1999).

¹⁷³ *Id.* at 97-102.

¹⁷⁴ *Id.* at 97-99.

discarded the entire objective in its latest report to the Climate Convention.¹⁷⁵ The Inuit also allege that U.S. climate policy violates the nation's due diligence obligation under customary law to ensure that activities within its jurisdiction or control do not cause damage to the environment of other states.¹⁷⁶ In addition, the petition claims that U.S. climate policy violates the precautionary principle, a principle of international law that is enshrined within the Climate Convention.¹⁷⁷

B. Possible Consequences of the IACHR's Decision

As mentioned above, the Inuit petition has received a great deal of publicity and support. According to Professor Anaya, the petition may break new ground in international law.¹⁷⁸ What can the IACHR decide if it rules in favor of the petitioners? First, if the IACHR finds one or more violations of human rights, it must draft a preliminary report outlining corrective measures.¹⁷⁹ Following this action, the defendant-state has a fixed time to implement the recommendation.¹⁸⁰ If the case is not resolved within three months of the transmittal of the preliminary report to the defendant-state, the IACHR can decide to issue and publish a final report containing possible monitoring measures.¹⁸¹ It can also include an annual report of the case to the General Assembly of the OAS, in which event the claim will receive even greater attention.¹⁸² It should be noted that the reports prepared by the IACHR as well as the proposals and recommendations contained in these reports are non-binding in international law;¹⁸³ thus, the United States cannot be legally obligated to perform any action.

As an initial step, the Inuit ask the IACHR to arrange an on-the-spot inspection in order to verify the damages caused to the Inuit.¹⁸⁴ They also ask the IACHR to arrange an opportunity for an oral hearing in which the IACHR can examine the claims

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 99-100.

¹⁷⁷ *Id.* at 101-102.

¹⁷⁸ ICC Executive Council Resolution, *supra* note 117.

¹⁷⁹ Rules of Procedure, *supra* note 131, art. 43. The Commission can also recommend that the parties negotiate an agreement. *Id.* art. 41. Presumably, it would be difficult in this case for the parties to reach a mutually agreeable solution.

¹⁸⁰ *Id.* art. 43(2).

¹⁸¹ *Id.* arts. 45-46.

¹⁸² *Id.* arts. 56-57.

¹⁸³ *See supra* note 149.

¹⁸⁴ ICC Petition, *supra* note 16, at 118.

presented in the petition.¹⁸⁵ The Inuit's central goal is to have the IACHR pronounce in its report that the United States is legally responsible for infringing upon the international norms of individual rights as set forth in the American Declaration and other international laws.¹⁸⁶ The Inuit also urge the IACHR to recommend that the United States commit to fulfilling its obligations to reduce greenhouse gas emissions and to participate in the climate regime.¹⁸⁷ Although the Kyoto Protocol is not specifically mentioned, the Inuit's petition essentially asks the IACHR to recommend that the United States ratify the Kyoto Protocol.

The Inuit also want the IACHR to encourage the United States to pay attention to the impacts of its emissions in the Arctic region and on the Inuit people before approving further major governmental measures.¹⁸⁸ In addition, the petition asks for a recommendation to:

Establish and implement, in coordination with Petitioner and the affected Inuit, a plan to protect Inuit culture and resources, including, *inter alia*, the land, water, snow, ice, and plant and animal species used or occupied by the named individuals whose rights have been violated and other affected Inuit; . . . mitigate any harm to these resources caused by US greenhouse gas emissions; [and] . . . [e]stablish and implement, in coordination with Petitioner and the affected Inuit communities, a plan to provide assistance necessary for Inuit to adapt to the impacts of climate change that cannot be avoided¹⁸⁹

As discussed above, it is difficult to say whether the Inuit petition will succeed. On the upside, the Inuit set forth compelling evidence detailing how climate change has already caused concrete damage to their land and people. However, this is a unique human rights petition, and the petition asks the IACHR to extend its reach across countries and issues. Even progressive, quasi-judicial bodies have to consider petitions of this kind in light of their role as bodies that resolve concrete infringements of human rights. The IACHR's recent move to organize an oral hearing in order to understand the reasoning behind the petition

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

seems to indicate that the petition may already be experiencing problems at the admission stage.¹⁹⁰

If the Inuit petition does succeed, its success would add a significant amount of credibility to the perception of climate change as a human rights problem. The rights contained in the Inuit petition can be found in all major, international human rights treaties. If the IACHR declares that the United States has infringed one or more of these rights, the door would open for all major victims of climate change to perceive climate change as a threat to their life, culture, etc. In essence, the ICC's strategy throughout the petitioning process has been to encourage all victims of climate change to frame their injustice as a human rights issue.¹⁹¹ Recently, "representatives of Arctic communities and Small Island Developing States . . . formed an alliance called Many Strong Voices to press for significant reductions in greenhouse gas emissions."¹⁹²

III

CONCLUSION

To date, international measures taken to combat climate change are clearly insufficient. In addition, the political will to make radical cuts to greenhouse gas emissions does not yet exist. Because of this lack of political will, international law is looked upon as a savior in much the same way as when the civil society

¹⁹⁰ Letter from Ariel E. Dulitzky, Assistant Executive Sec'y, Inter-Am. Comm'n on Human Rights, to Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference (Feb. 1, 2007), http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf.

¹⁹¹ Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Plenary Intervention at the Tenth Conference of Parties to the United Nations Framework Convention on Climate Change (Dec. 17, 2004), *available at* <http://www.inuitcircumpolar.com/index.php?ID=283&Lang=En>.

[Conferences of the Parties] should discuss the current and projected impacts of climate change on human rights—particularly the human rights of Indigenous Peoples who are particularly vulnerable to climate change. You can't ignore this dimension much longer. People around the world know that climate change affects their lives, and responding is not just about carbon sinks, emission trading schemes, and technology transfers. If you want to engage the world talk about the human rights of global climate change.

Id.

¹⁹² Press Release, United Nations Env'tl. Programme Key Polar Ctr., Many Strong Voices Join Forces on Climate Change (May 10, 2007), <http://polar.grida.no/news.cfm?pressReleaseItemId=1066>.

movement tried to influence international nuclear policy by pressing the UN General Assembly to request an advisory opinion from the ICJ. Legal scholars are now considering how international legal proceedings could be exploited to resolve the political deadlock surrounding climate change.

The general or ambiguous construction of the primary norms of international law provides ample opportunity to interpret them in a climate-friendly manner. While this potential for interpretation certainly exists, the secondary norms of international law lack force. The ICJ's recent jurisprudence indicates that secondary norms are growing stronger, but they have not yet evolved to the extent that they can be successfully invoked in international legal proceedings. Moreover, the various problems associated with procedure and jurisdiction hamper taking climate change claims to international legal proceedings.

Different methods of dispute settlement are available to handle claims relating to rules and regulations of particular international laws. However, the dispute settlement and supervisory bodies administering these laws were established to promote specific areas of interest, not to resolve climate change. Accordingly, these bodies may be quite reluctant to allow their dispute settlement procedures to be used to combat climate change, especially when a specific regime has been created to solve this problem.

As the only body charged with resolving disputes for all the different sub-areas of international law, the ICJ may be in the best position to take a stance on issues related to climate change. However, the ICJ has only limited ability to make radical decisions.¹⁹³ Since the ICJ's jurisdiction is based on the consent of states, the ICJ has to be careful not to lose the trust of the state community. If it makes a decision that is considered extreme, there may be a decline in the willingness of states to submit their disputes to the ICJ. The same logic extends to the ICJ's use of advisory opinions. A radical statement would weaken the state community's trust in the ICJ.

International law functions best when an arbitral tribunal determines the international boundary of two neighboring states or when a human rights court decides a case between an individual and her state. The decisions favoring indigenous peoples in the

¹⁹³ *But see* DOELLE, *supra* note 97, at 320-26.

Inter-American human rights system have also been very concrete cases in which the state or companies have physically broken into traditional areas of indigenous peoples. Environmental disputes that have gone to legal dispute settlement have also concerned concrete cases of pollution (or the possibility of pollution) between neighboring states.¹⁹⁴ As a global problem, climate change is poorly suited to being handled by today's international legal proceedings.¹⁹⁵ All the states in the world contribute to climate change to some degree, and its damage impacts various regions in very different ways.

Although some parts of the planet are already heavily impacted, the damage caused by climate change will materialize gradually during the coming decades. Presently, it will be difficult for victims of climate change to take their cases to international legal proceedings because these proceedings can remedy only damage that has already been caused. As indicated above, international law may be slowly moving toward remedying future wrongs, but it has not yet reached that point. Since the concrete effects of climate change can already be verified in the Arctic region, the Inuit human rights petition is the best current possibility for success. Still, the petition will probably face many twists and turns on its road.

In the future, it is unclear whether the climate regime will be able to enact a more efficient and long-term climate policy. Even if it does not, the urgency for a legal solution will increase as the impacts of climate change start to become more concrete in different regions of the world. Another and perhaps more likely alternative is that the materialization of the damages caused by climate change will gradually increase the opportunities for a political solution to the issue. Unfortunately, measures taken to reduce emissions at that point in time will probably be too late.

The major victims of climate change are currently facing a most unjust situation. Their land and culture may soon be destroyed by the effects of climate changes caused almost exclusively by others. It looks as if these groups will have a difficult time finding justice even if they rely on international law in its

¹⁹⁴ See, e.g., Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); Lake Lanoux Arbitration (Spain v. Fr.), 12 R.I.A.A. 281 (1957); Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

¹⁹⁵ See Jutta Brunnée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 INT'L & COMP. L.Q. 351, 353 (2004).

present form. At the moment, it does not seem likely that individual states' legal responsibility could be enforced via international legal proceedings for the damages they have caused via their climate policy.

For the major victims of climate change, the most significant and immediate consequence of their legal strategy might not be winning their case. By making public their legal claims against the worst polluters, victims are able to improve their position in the effort to combat climate change. The climate regime involves a great number of actors and many structures of decision-making.¹⁹⁶ Publishing their legal claims allows small states and indigenous peoples to reinforce their activities in the climate regime and obtain a louder voice in the global regime. For example, the ICC consciously brought its human rights petition to the public eye during its drafting phase and organized press meetings during the Climate Convention's Conference of the Parties. The ICC's actions demonstrate how to effectively challenge both the basic rules prescribed by the climate regime and the structure upheld by international law as a society of states.¹⁹⁷ By raising the human rights petition against the United States, the Inuit expanded society's notion of who is entitled to participate in the fight against climate change.

Through their consolidated agency, the major victims of climate change also brought their plight—their homeland falling below sea level and the death of their culture—into the public eye. This message challenged the climate regime's view that climate change is a problem that we can control and manage. By presenting climate change as a question of survival for themselves and the whole human race, the Inuit and Tuvaluans have helped transform climate change from a low-grade political problem into one of the most compelling political problems of our time.

Moreover, the Inuit support the characterization of climate change as an issue of security policy. Action to counter climate

¹⁹⁶ See YAMIN & DEPLEDGE, *supra* note 9, at 30-59.

¹⁹⁷ See Timo Koivurova & Leena Heinämäki, *The Participation of Indigenous Peoples in International Norm-Making in the Arctic*, 42 POLAR REC. 101 (2006), available at <http://journals.cambridge.org/production/action/cjoGetFulltext?fulltextid=435124> (arguing that by consolidating the agency of ICC in the climate change regime, the petition process might also have consequences for the Inuit agency in general in international relations, and also contribute to the new ways of seeing how indigenous peoples should be involved in international cooperation).

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change should thus be taken just as seriously as matters falling within the sphere of international security policy, such as the war against terrorism or the proliferation of nuclear weapons.¹⁹⁸ The political definition of a social problem often affects the kind of resources devoted to solving it. Therefore, climate change victims should consider their legal strategies successful if they contribute to reframing the political problem in a way that fosters more popular support.

¹⁹⁸ See BILL MCSWEENEY, SECURITY, IDENTITY AND INTERESTS: A SOCIOLOGY OF INTERNATIONAL RELATIONS 45-67 (1999); see also Lorraine Elliott, *Expanding the Mandate of the United Nations Security Council*, in REFORMING INTERNATIONAL ENVIRONMENTAL GOVERNANCE: FROM INSTITUTIONAL LIMITS TO INNOVATIVE REFORMS 204-22 (W. Bradnee Chambers & Jessica F. Green eds., 2005) (discussing the securitization of environmental problems); but see Monica Tennberg, *Environmental Threats, Governmentality and Security in Northern Europe*, in NORTH EUROPEAN AND BALTIC SEA INTEGRATION (Lars Hedegaard & Bjarne Lindström eds., 2002) (offering a critical perspective of the concept). The securitization of climate change might translate into legal rules and doctrines similar to those establishing obligations of protection for the whole community of states (responsibility to protect) in cases of genocide, war crimes, ethnic cleansing and crimes against humanity. See R2P: Now an International Doctrine, <http://www.responsibilitytoprotect.org/index.php/features/383?theme=alt5> (last visited Oct. 28, 2007). It is well worth questioning whether the Tuvaluans for example should be able to enjoy such protection as outlined in the 2005 World Summit. See *id.* Interestingly, the United Kingdom raised the issue of climate change in the Security Council of the UN. Paul Reynolds, *Security Council Takes on Global Warming*, BBC NEWS (Apr. 18, 2007), <http://news.bbc.co.uk/2/hi/americas/6559211.stm>.

